

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.722 of 2018

- =====
1. Ved Prakash
 2. Badri Nath,
 3. Subhash Chandra, all 1 to 3 are sons of Sri Ramesh Chandra Chaudhary,
 4. Raj Kumari Devi, wife of Badri Nath
 5. Babita Devi, wife of Ved Prakash
 6. Punam Devi, wife of Subhash Chandra, all 1 to 6 are Resident of Mo.-
Bagtaj Khan alias Pokhra PO and PS- Hajipur Town, District- Vaishali.
- Petitioner/s

Versus

1. Kedar Nath Chaudhary, Son of Late Harihar Chaudhary, Resident of Mo.-
Bagtaj Khan alias Pokhra PO and PS- Hajipur Town, District- Vaishali.
 2. Baidyanath Chaudhary
 3. Vishwanath Chaudhary
 4. Sajjan Chaudhary
 5. Madan Chaudhary
 6. Vijay Chaudhary, all 2 to 6 are sons of Late Harihar Chaudhary, Resident of Mo.-
Bagtaj Khan alias Pokhra PO and PS- Hajipur Town, District- Vaishali.
- Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. D. K. Sinha, Sr. Advocate Mr. Bajarangi Lal, Advocate
For the Respondent/s	:	Mr. Y. C. Verma, Sr. Advocate Mr. Adarsh Singh, Advocate Ms. Priyanka Singh, Advocate

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*Constitution of India--Article 227---Code of Civil Procedure, 1908---section 11;
 Order VI, Rule 17--- petition to set aside order of the learned trial court allowing the
 amendment petition in partition suit wherein the plaintiff made amendment with
 regard to claim of his share as the plaintiff/respondent no. 1 sought enhancement of
 his share from 1/7th to 1/6th of the suit property by amendment at different places in
 the plaint--- plea that the same plaintiff filed earlier a partition suit, which was
 decreed ex-parte and 1/7th share was allotted to the plaintiff/respondent no.1. and
 that the amendment was moved after much delay and was decided without deciding
 section 11 application---Held: previous decree in partition suit would not affect the
 claim of the plaintiff/respondent no.1 in subsequent suit and the amendment on this
 count could not be assailed as in a partition suit the share of joint family property
 could change under a number of circumstances--- amendment can be brought at any*

stage of the trial even after commencement of trial, if it is necessary for doing full and complete justice between the parties, subject to cost or otherwise--- no illegality in taking up amendment application before deciding the pending section 11 application---impugned order affirmed subject to payment of cost of Rs. 10,000/- to be paid to the petitioners--- Civil Misc. Petition dismissed. (Para 5, 6)

2022 SCC OnLine SC 1128, (2009) 10 SCC 626Relied Upon.

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Appearance :

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| For the Petitioner/s | : | Mr. D. K. Sinha, Sr. Advocate |
| | | Mr. Bajarangi Lal, Advocate |
| For the Respondent/s | : | Mr. Y. C. Verma, Sr. Advocate |
| | | Mr. Adarsh Singh, Advocate |
| | | Ms. Priyanka Singh, Advocate |

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT
Date :15-05-2024

The petitioners have filed the instant petition under Article 227 of the Constitution of India for setting aside the order dated 24.01.2018 passed by the learned Sub. Judge-IV, Hajipur in Title Suit No. 253 of 2001, whereby and whereunder the petition dated 16.08.2017 filed by the plaintiff/respondent



no. 1 under Order 6 Rule 17 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code') has been allowed.

02. It emerges from the record that the plaintiff/respondent no. 1 filed a partition suit bearing Title Suit No. 253 of 2001 in the Court of learned Sub. Judge-I, Hajipur seeking 1/7th share in Schedule-I of the plaint after partition of the suit property and also for a direction to defendants-2nd set, petitioners herein, to execute the sale deed in favour of the plaintiff/respondent no. 1 for the land of Schedule-2 along with house mentioned in Schedule-2 property of the plaint with alternative prayer that if the defendants-2nd set/petitioners failed to executed the sale-deed, the same might be executed through the process of the Court.

The defendants-2nd set/petitioners appeared in the suit after notice and filed their joint written statement controverting the case of the plaintiff. It has also been pointed out that another partition suit bearing No. 102 of 2000 was filed by respondent no. 4 against the plaintiff/respondent no. 1 and other six brothers for partition of Schedule-I property wherein the present plaintiff-Kedar Nath Chaudhary was transposed as plaintiff and said suit bearing PS No. 102 of 2000 was decreed *ex-parte* vide judgment and decree dated 23.01.2003 and



05.02.2003, respectively and the plaintiff-Kedar Nath Chaudhary was held entitled for 1/7 share in the suit property. Thereafter, the plaintiff/respondent no.1 filed petition for preparation of final decree and the present petitioners were added as party defendants vide order dated 03.05.2003 in F.D. Case No. 102 of 2000. It further transpires that during pendency of the present suit bearing Title Suit No. 253 of 2001, the defendant-1st set/respondent nos. 2 to 6 filed a petition under Section 11 of the Code for staying the suit proceeding during pendency of the final decree proceeding of PS No. 102 of 2000. At the same time, Misc. Case No. 09 of 2003 was filed by defendant-2nd set/petitioners for setting aside the ex-parte decree proceeding of P.S. No. 102 of 2000 and to allow them to contest the suit. The learned trial court after hearing the parties, vide order dated 03.07.2004, stayed the further proceeding of Title Suit No. 253 of 2001 till disposal of Misc. Case No. 09 of 2003. It further appears that during pendency of Title Suit No. 253 of 2001, original defendant no. 2, namely, Paras Nath Chaudhary died issue-less and the plaintiff/respondent no.1 filed petition dated 18.10.2011 for expunging the name of defendant no. 2 which was ultimately allowed vide order dated 15.06.2012 and the name of defendant no. 2 was deleted from the plaint.



Meanwhile, Misc. Case No. 09 of 2003 was dismissed as withdrawn and the learned trial court vide order dated 11.04.2017 vacated its order dated 03.07.2004 and started the proceedings in Title Suit No. 253 of 2001 for further hearing and on 30.05.2017, the issues have been framed in the suit. Thereafter, the plaintiff/respondent no. 1 filed petition dated 16.08.2017 under Order 6 Rule 17 of the Code seeking amendment in the plaint stating therein, *inter alia*, that since the brother of the plaintiff/respondent no. 1 died issue-less, therefore, share of the plaintiff would change to 1/6th in place of 1/7th. Thus, the plaintiff/respondent no.1 sought amendment in second line of paragraph-10 Page-10, 2nd line of Para-13 and 1st line of Para-14 of the plaint by striking of 1/7th and for inserting 1/6th in its place. The petitioners/defendant-2nd set filed rejoinder opposing the amendment petition. The learned trial court vide impugned order dated 24.01.2018 allowed the amendment petition subject to payment of cost of Rs.300/-.

03. Learned senior counsel appearing on behalf of the petitioners has submitted that the order of the learned trial court is not sustainable and it has been passed in most mechanical manner without appreciating the objections and contentions raised by the petitioners. The impugned order is illegal, arbitrary



and is without jurisdiction and the same is liable to be set aside. The learned senior counsel further submitted that the learned trial court failed to take into consideration the fact about share of the plaintiff/respondent no. 1 to the extent of 1/7th in the suit property being decreed in Partition Suit No. 102 of 2000. Once, the share of the plaintiff/respondent no. 1 was decided, it was not open for him to claim further share in the suit property on account of death of his brother, defendant no. 2- Paras Nath Chaudhary. The learned trial court has not considered that at the time of his death, Paras Nath Chaudhary was not holding any share in the suit property. Moreover, the defendants-2nd set, petitioners herein, have already purchased property in dispute long before and allowing the amendment at this stage would cause serious prejudice to the petitioners. Learned senior counsel further submitted that since the partition of the suit land along with building existing on it has already taken effect in the Partition Suit No. 102 of 2000, amendment cannot be allowed unless the judgment and decree of partition suit No. 102 of 2000 are set aside. Learned senior counsel further submitted that the learned trial court has also not considered that an application under Section 11 of the code has been pending and without disposal of the application under Section 11 of the Code, it was



not proper for the learned trial court to hear and allow the amendment petition filed by the plaintiff/respondent no.1. The plaintiff/respondent no. 1 in the garb of the proposed amendments intends to get the decree passed in their partition suit No. 102 of 2022 nullified. Learned senior counsel further submitted that the learned trial court has not considered that the amendment petition has been filed after trial has commenced and the same was barred under proviso to Order 6 Rule 17 of the Code. Learned senior counsel also submitted that the amendment has been sought after much delay since the defendant no.2-Paras Nath Chaudhary died much earlier to the amendment and the plaintiff got his name expunged vide order dated 15.06.2012 by filing application dated 18.10.2011, so, there was no occasion for the plaintiff/respondent no. 1 to keep on waiting for such long period and the plaintiff/respondent no. 1 has failed to show that despite due diligence, he could not move the amendment petition earlier. The learned trial court failed to appreciate the fact that on the date of death, defendant no. 2-Paras Nath Chaudhary was not in possession of any share of the suit property and he along with his five brothers had already sold their share to the petitioners much before filing of the present suit. At the same time, learned trial court while



allowing the amendment petition, did not provide proper opportunity to the defendants-2nd set/petitioners to rebut the same. Thus, the learned counsel submitted that in view of the aforesaid facts, the impugned order is bad in the eye of law as well as on fact and fit to be set aside as the impugned order is illegal and without jurisdiction.

04. Learned senior counsel appearing on behalf of the respondents submitted that the issues regarding pendency of an application under Section 11 of the Code or previous partition are not material for consideration of the amendment application since in the amendment application merit of the amendment sought could not be looked into and it is to be seen whether the amendments are necessary for adjudication of the real controversy between the parties. In a catena of decisions, the Hon'ble Supreme Court has held that amendment should be liberally allowed and only in exceptional circumstances, it should be refused. Learned senior counsel further submitted that in a partition suit there could be more than one preliminary decree and issue of maintainability would not come in the way of consideration of the amendment petition on the ground of previous partition wherein the need for moving the amendment and controversy between the parties have been highlighted for



consideration of the learned trial court. Learned senior counsel further submitted that though the respondents moved the amendment at the earliest opportunity, yet delay could not be a reason for denial of amendment sought by the respondents.

05. I have given my thoughtful consideration to the different aspects of the matter and submission made on behalf of the petitioners. The petitioners are aggrieved by the order of the learned trial court allowing the amendment petition in partition suit wherein the plaintiff made amendment with regard to claim of his share as the plaintiff/respondent no. 1 sought enhancement of his share from 1/7th to 1/6th of the suit property by amendment at different places in the plaint. Objection to such amendment is mainly on the count that the same plaintiff filed earlier a partition suit, which was decreed *ex-parte* and 1/7th share was allotted to the plaintiff/respondent no.1. Further objection is on the ground that the amendment was moved after much delay and the same was decided without deciding the application which has been filed under Section 11 of the Code. I do not find much merit in the submission about amendment petition not maintainable on the ground that in earlier partition suit, the share of the plaintiff was decided to the extent of 1/7th share. The suit filed by the plaintiff/respondent



no. 1 is a partition suit and the share of joint family property could change under a number of circumstances. A circumstance here is death of one of the co-sharers. Whether that co-sharer was having any property left or not is a matter of trial and the same could not be rejected *in limine*. So, the previous decree in partition suit would not affect the claim of the plaintiff/respondent no.1 in subsequent suit and the amendment on this count could not be assailed.

06. So far as delay part is concerned, from the facts as enumerated herein above, it appears that the amendment has been filed after delay of about six years. Though, there appears no explanation for the delay on the point, the delay in all cases would not dis-entitle a party from moving amendment and getting the pleadings amended, if it is necessary for doing full and complete justice between the parties. Although, the proviso to Order 6 Rule 17 of the Code bars amendment after commencement of trial, the same could not be allowed to come in the way of adjudication of real dispute between the parties. The law on the point of amendment at the stage of ‘after commencement of trial’ is no more *res integra* and the Hon’ble Supreme Court in the case of ***Surender Kumar Sharma v. Makhan Singh***, reported in **(2009) 10 SCC 626** has held that



amendment can be brought at any stage of the trial even after commencement of trial, if it is necessary for doing full and complete justice between the parties, subject to cost or otherwise. Thus, the amendment can be allowed if the affected parties could be compensated in terms of cost.

07. Whatever be the claim of the petitioner about assignment of property in their favour by the deceased defendant or his brother, the same could be agitated before the learned trial court in course of trial. On this count, the petitioners' claim about serious prejudice being caused to them does not matter since in any case they have to establish their right and change in claim of share by the plaintiff/respondent no. 1 is not material for the said purpose. The pendency of an application under Section 11 of the Code and moving an application under Order 6 Rule 17 of the Code are different issues. If any application under Section 11 of the Code was pending, ideally, the learned court below should have disposed of the same before taking up the application moved for amendment for consideration. But the same is not an illegality.

08. Moreover, the Hon'ble Supreme Court in a *catena* of decisions have held that the endeavour of the Court should be to decide the real controversy between the parties and towards



that while allowing amendments a liberal view should be taken. Even recently, the Hon'ble Supreme Court in the case of ***Life Insurance Corporation of India Vs. Sanjeev Builders Private Limited and Anr***, reported in ***2022 SCC OnLine SC 1128***, in Paragraph-70, has given a number of guidelines for allowing the amendment in the following terms:-

“70. Our final conclusions may be summed up thus:

(i) Order II Rule 2 CPC operates as a bar against a subsequent suit if the requisite conditions for application thereof are satisfied and the field of amendment of pleadings falls far beyond its purview. The plea of amendment being barred under Order II Rule 2 CPC is, thus, misconceived and hence negated.

(ii) All amendments are to be allowed which are necessary for determining the real question in controversy provided it does not cause injustice or prejudice to the other side. This is mandatory, as is apparent from the use of the word “shall”, in the latter part of Order VI Rule 17 of the CPC.

(iii) The prayer for amendment is to be allowed

(i) if the amendment is required for effective and proper adjudication of the controversy between the parties, and

(ii) to avoid multiplicity of proceedings, provided

(a) the amendment does not result



in injustice to the other side,

(b) by the amendment, the parties seeking amendment does not seek to withdraw any clear admission made by the party which confers a right on the other side and

(c) the amendment does not raise a time barred claim, resulting in divesting of the other side of a valuable accrued right (in certain situations).

(iv) A prayer for amendment is generally required to be allowed unless

(i) by the amendment, a time barred claim is sought to be introduced, in which case the fact that the claim would be time barred becomes a relevant factor for consideration,

(ii) the amendment changes the nature of the suit,

(iii) the prayer for amendment is malafide, or

(iv) by the amendment, the other side loses a valid defence.

(v) In dealing with a prayer for amendment of pleadings, the court should avoid a hypertechnical approach, and is ordinarily required to be liberal especially where the opposite party can be compensated by costs.

(vi) Where the amendment would enable the court to pin-pointedly consider the dispute and would aid in rendering a more satisfactory decision, the prayer for amendment should be allowed.

(vii) Where the amendment merely



sought to introduce an additional or a new approach without introducing a time barred cause of action, the amendment is liable to be allowed even after expiry of limitation.

(viii) Amendment may be justifiably allowed where it is intended to rectify the absence of material particulars in the plaint.

(ix) Delay in applying for amendment alone is not a ground to disallow the prayer. Where the aspect of delay is arguable, the prayer for amendment could be allowed and the issue of limitation framed separately for decision.

(x) Where the amendment changes the nature of the suit or the cause of action, so as to set up an entirely new case, foreign to the case set up in the plaint, the amendment must be disallowed. Where, however, the amendment sought is only with respect to the relief in the plaint, and is predicated on facts which are already pleaded in the plaint, ordinarily the amendment is required to be allowed.

(xi) Where the amendment is sought before commencement of trial, the court is required to be liberal in its approach. The court is required to bear in mind the fact that the opposite party would have a chance to meet the case set up in amendment. As such, where the amendment does not result in irreparable prejudice to the opposite party, or divest the opposite party of an advantage which it had secured as a result of an admission by the party seeking amendment, the



amendment is required to be allowed. Equally, where the amendment is necessary for the court to effectively adjudicate on the main issues in controversy between the parties, the amendment should be allowed.”

09. In the light of aforesaid discussion, I am of the view that the impugned order does not require interference by this Court except on the point of payment of cost to the petitioners. Hence, the order dated 24.01.2018 passed by the learned Sub. Judge-IV, Hajipur in Title Suit No. 253 of 2001 is affirmed subject to payment of cost of Rs. 10,000/- to be paid to the petitioners within a month from the date of this order. At the same time, the learned trial court will take into consideration the fact that the petitioners/defendant-2nd set are given ample opportunity to controvert/rebut the amendment sought to be brought, if they so desire. Furthermore, the learned trial court would take up the petition filed under Section 11 of the Code by the petitioners for disposal at the earliest.

10. Accordingly, the instant Civil Misc. Petition stands dismissed but with aforesaid modification in the impugned order.



11. This Court has not expressed any opinion on the merits of the case in any manner and whatever has been observed, is only for the purpose of disposal of the present petition and the learned trial court will not be prejudiced by any of the observations made by this Court.

(Arun Kumar Jha, J)

Ashish/-

AFR/NAFR	AFR
CAV DATE	25-04-2024
Uploading Date	16-05-2024
Transmission Date	NA

